IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

LRs. Of Jagannath.
vs.
Ganesh Lal.

S.B.CIVIL SECOND APPEAL NO.5/1984 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 15.12.1983 PASSED BY SHRI LAXMI DUTT SHARMA, ADDITIONAL CIVIL JUDGE NO.1, UDAIPUR IN CIVIL APPEAL NO.16/1981.

DATE OF JUDGMENT ::: 15.1.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. R Chouhan, for the appellant.
Mr. JK Bhaiya, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

The appellant/defendant is aggrieved against the judgment and decree of the first appellate court dated

15.12.1983 by which the first appellate court allowed the plaintiff/respondent's appeal against the judgment and decree of the trial court dated 24.5.1977 passed in civil original suit no.427/1971. The first appellate court took note of the subsequent event and granted mandatory injunction in favour of the plaintiff/respondent which appears to be because of the reason that the trial court dismissed the suit of the plaintiff for mandatory injunction of removal of one safety tank and a platform raised over the said safety tank and also denied the relief of prohibitory injunction against raising of construction of latrine and bathroom over the said platform by the defendant on the ground that the defendant is not intending to raise construction of latrine and bathroom on the platform over the safety tank. The first appellate court held that any construction raised by the defendant accept the safety tank and platform be removed because of the reason that said construction was raised by the defendant after dismissal of the suit of the plaintiff.

According to learned counsel for the appellant/ defendant, the trial court while deciding the issue no.1 very specifically held that in map Ex.A/3 of the year 1915, there is a clear mention of one platform measuring 2'4” x 5'4” and further there is mention of one more platform. The trial court on the basis of the

said documentary evidence held that the platform was old one and below that platform, the safety tank was constructed by the defendant and thereafter, he reconstructed the platform over the safety tank. In view of the above, the plaintiff is not going to suffer any injury because of the construction of the safety tank and reconstruction of the platform above that safety tank by the defendant. It is submitted that even if the latrine and bathroom are constructed over the said platform, then also, the plaintiff cannot suffer any substantial injury entitling him to seek injunction of removal of structure which was raised over a small piece of land and that too for which the defendant is claiming to be owner since the year 1915. It is also submitted that the first appellate court straightway decreed the suit of the plaintiff for removal of the other structure constructed by the defendant only on the ground that the construction was raised by the defendant after the dismissal of the suit whereas the first appellate court has not applied its mind to the fact even if the construction was raised subsequently, then also whether it has caused any substantial injury to the plaintiff.

Learned counsel for the plaintiff/respondent vehemently submitted that the entire lane is a common land and, therefore, the defendant had no right to

raise construction on any inch of the land without the consent of the plaintiff. It is also submitted that the plaintiff filed the suit for prohibitory injunction and that was dismissed by the trial court merely on the ground that the defendant himself disclosed that he is not going to raise any construction over the said platform. In view of the above, the finding of the trial court cannot be said to be in favour of the defendant because of the reason that the trial court believed the statement of the defendant and, therefore, did not granted decree for prohibitory injunction otherwise, the defendant could not have raised the construction of latrine and bathroom. So far as latrine and bathroom are concerned, they are admittedly raised by the defendant.

The plaintiff has also submitted cross objection in this case against finding on issue no.2 as recorded by the trial court and was upheld by the first appellate court. By this cross objection, the plaintiff submitted that the finding recorded by two courts below with respect to the wall situated between the house of the plaintiff and defendant being joint is against the record of the case and is based on misreading of the pleadings and evidence and the court below wrongly held that the wall in dispute is joint wall. It is submitted that the plaintiff's case before the court below was

that towards the western side of his house, the disputed wall is situated and it is upto four storey and the whole of the wall belongs to the plaintiff whereas the defendant in absence of the plaintiff removed major portion of this wall and has started raising stair case with this wall. It is submitted that because of this action of the defendant, there is an eminent danger to whole of the building. In the alternative, it was submitted that even if it is held that the wall is joint wall, then too, the defendant had no right to disturb 3/4th of the wall.

I considered the submissions of learned counsel for the parties and perused the reasons given by the two courts below as well as the record of the case.

Following substantial questions of law were framed on 11.1.1984 while admitting the second appeal :-

(1)Whether the learned lower appellate court has mis-read the documents Ex.A1 to Ex.A4 ?
(2)Whether the learned lower appellate court failed to take into consideration the fact whether the construction of Latrine, bath & balcony (Ros) amounts to reasonable user of the joint chowk ?

So far as the finding of fact recorded by the

trial court with respect to the platform and safety tank are concerned, that finding is based on oral as well as documentary evidence particularly, the map of the year 1915. Otherwise also, looking to the total evidence, it appears that there were two platforms and under one, a safety tank was constructed by the defendant. The platform which was in existence already obstructed the way back in the year 1915, therefore, the trial court rightly held that by construction of safety tank, the plaintiff has not suffered any injury as the defendant after constructing the safety tank, reconstructed that platform. The first appellate court also did not disturb this finding and has not granted any relief of injunction in favour of the plaintiff. In view of this fact, it is clear that the land in question falling under the platform and above the safety tank could not have been used as a way by the plaintiff and in the map of the defendant, said platform (chabootari) has been shown as of defendant, therefore, the defendant if raised any construction of latrine and bathroom, then the plaintiff should have amended the plaint and should have stated how that construction has caused substantial injury to the plaintiff. That has not been done but a fact has been picked up by the first appellate court only on the basis of plea of the plaintiff that the defendant has raised construction of latrine and bathroom subsequent

to the dismissal of the suit. It appears from the judgment of the first appellate court also that the first appellate court had merely allowed the plaintiff's plea on the basis of plaintiff's plea raised in appeal that the construction was raised after dismissal of the suit by the plaintiff without examining whether any injury is likely to be caused to the plaintiff. Therefore, the finding of the court below is based on no pleading and no evidence with respect to the grant of mandatory injunction for latrine and bathroom or any other construction. So far as the respondent/plaintiff's cross objection is concerned, the entire claim in cross objection filed by the respondent is that there is eminent danger because of scratching of the respondent's wall by the defendant. That is proved wrong by the fact that by this time, there is no contention of the respondent that in fact, any danger has resulted into loss to the respondent when more than almost 35 years have passed from the time of filing of the suit by the plaintiff for injunction.

In view of the above, the substantial questions of law no.1 and 2 are decided and it is held that the first appellate court has not correctly appreciated the fact that the court below itself held that in the map of the year 1915, there is mention of chabootaries.

Further it is held that the first appellate court committed error of law in passing the decree for mandatory injunction of removing of latrine and bathroom without recording any finding with respect to any injury to the plaintiff.

Consequently, this appeal is allowed, the cross objection filed by the plaintiff/respondent is dismissed, the judgment & decree of the first appellate court dated 15.12.1983 is set aside and the judgment & decree of the trial court dated 24.5.1977 dismissing the suit of the plaintiff/respondent is affirmed.

(PRAKASH TATIA), J.

S.Phophaliya